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Presidents as Supreme Court Advocates: Before and After the White House

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Prologue

Eight men who took the presidential oath also appeared before the Supreme Court of the United States as advocates. From Senator John Quincy Adams at the outset of the Marshall Court to Richard M. Nixon during the high-water mark of the Warren Court, future and past Presidents have argued before the Supreme Court on such varied and important topics as land scandals in the South, slavery at home and on the high seas, the authority of military commissions over civilians during the Civil War, international disputes as an aftermath of the Alaskan Purchase, and the sensitive intersection between the right to personal privacy and a free press. Here, briefly, are stories of men history knows as Presidents performing as appellate lawyers and oral advocates before the nation's highest court.

John Quincy Adams: Senator—Lawyer—Diplomat—Congressman

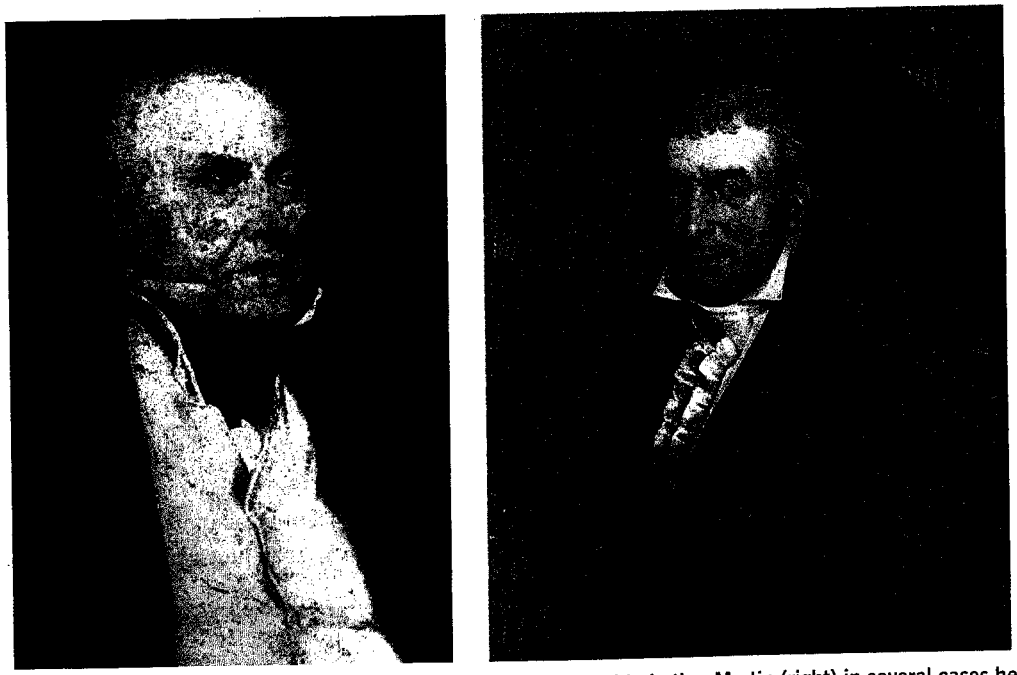
As a young man, John Quincy Adams was admitted to practice law but grew bored with it and performed diplomatic chores for the Washington and Adams administrations in the 1790s. Judge John Davis of the U.S. district court in Massachusetts then named Adams Commissioner of Bankruptcy, making him a federal employee with a regular paycheck. The coming of the Jefferson administration ended that employment, with legislation removing job appointments from judges' purview and placing them at the disposal of the President. So Adams was out of work except for a small law practice and a part-time teaching position at Harvard. He could now start a political career of his own.[1]

Adams was elected to the U.S. Senate by the Massachusetts legislature in 1802, but the Senate did not convene until March 4, 1803. By the time he arrived at the Capitol, space had finally been found in that crowded building for

the Supreme Court of the United States, and Adams became a regular spectator at its sessions. The Courtroom was only a few steps from the Senate chamber, and Adams was inspired to be admitted to practice before the Supreme Court.

Adams made his debut before the Supreme Court early in his Senate term. On February 23 and 24, 1804, Senator Adams argued before the Supreme Court in *Church v. Hubbart*,[2] a case from the federal circuit court in Massachusetts involving a maritime insurance policy excluding coverage for illicit trade with the Portuguese in Brazil. Despite Adams' best efforts, Chief Justice John Marshall remanded the case on a technical point for trial in order to authenticate certain edicts of Portugal. Adams' seasoned opponents in this case were Luther Martin and Richard Stockton. In the same 1804 term, Adams argued *Head and Amory v. Providence Insurance Co.*,[3] a case from the federal circuit court in Rhode Island. His co-counsel was John T. Mason, a prominent Jeffersonian lawyer from Maryland. Adams' opponent, once again, was Martin, the great "Federalist Bulldog" from Maryland. On February 25, 1804, Chief Justice Marshall ruled in favor of Head and Amory, Adams' clients, and remanded for new trial. After arguing his first two cases before the Supreme Court with mixed results, Adams wrote to a friend, "I have never witnessed a collection of such powerful legal oratory as at this session of the Supreme Court."[4]

Later in life, Adams would say harsh things about President Jefferson,[5] but during his single partial term in the Senate, he supported the President's embargo and efforts to purchase Louisiana. Senator Adams' pro-embargo stance did not endear him to his federalist constituency and the Massachusetts legislature took the unusual act of, in effect, terminating his term before he had served its full six years. Adams' Senate stint thus ended prematurely on June 8, 1808, by resignation. Historian Allan Nevins described it as a "rebuke":



Senator John Quincy Adams (left) found himself opposing counsel to Luther Martin (right) in several cases he argued before the Supreme Court. Martin, known as the "Federalist Bulldog," was a frequent advocate who had effectively represented Maryland at the Constitutional Convention in 1787.

> Adams's term as Senator was to expire March 4, 1809. By electing his successor so many months before it was necessary to do so, the Massachusetts legislature administered a stinging and insulting rebuke to him. The anti-Embargo resolves underlined this rebuke, and Adams' pride compelled him to resign forthwith. The son of John Adams lost his office for supporting Thomas Jefferson![6]

Former Senator Adams' next argument before the Supreme Court was delivered in Long's Tavern on Capitol Hill, near the present location of the Supreme Court building, on February 9, 1809. The case, *Hope Insurance Company at Providence v. Boardman and Pope*,[7] again came from the federal circuit court in Rhode Island, but this time Adams represented the insurance company. His opponent in *Hope* was Jared Ingersoll, an experienced advocate who had been a member of the Constitutional Convention of 1787 and who would become the unsuccessful vice-presidential candidate of the Federalist Party in its last gasp. The case itself is of little consequence, although Adams' own notes and at least two biographers indicate that he was unprepared for questions relating to diversity of citizenship jurisdiction of corporations. The case was decided against his client in a one-sentence, per curiam opinion.

Adams' fourth endeavor, *Fletcher v. Peck*, was a major case involving the notorious land-fraud controversy in the western area of Georgia called Yazoo County, now in Mississippi. Adams represented John Peck of Boston, who had purchased land grants in Yazoo provided by a corrupt Georgia legislature in 1794. Georgia soon rescinded the authorization for the Yazoo land grants, and Robert Fletcher of Amherst, New Hampshire, brought a "friendly suit" against Peck, apparently on the basis of diversity of citizenship jurisdiction, dragging the federal judiciary into the southern land dispute. The litigation came before Associate Justice William Cushing, sitting on circuit in Massachusetts,[8] who ruled for Peck. Adams argued the appeal before the Supreme Court on March 2, 1809, from 11:00 A.M. to 4:00 P.M.; a Federalist Congressman from South Carolina, Robert Goodloe Harper, was co-counsel. Opposing counsel was again Luther Martin, arguing for Fletcher. Spectators found Adams "dull and tedious."[9]

A few days after the arguments in *Fletcher*, Adams wrote in his memoirs about the proceedings:

> This morning the Chief Justice read a written opinion in the case of *Fletcher v. Peck*. The judgment of the circuit court was reversed for a defect in the pleadings. With regard to the merits of the case, the Chief Justice added verbally, that, circumstances as the court are, only five judges attended, there were difficulties which would have prevented them from giving any opinion at this term had the pleadings been correct; the court the more readily forbore giving it, as from the complexion of the pleadings they could not but see that at the time when the covenants were made the parties had notice of the acts covenanted against; that this was not to be taken as part of the clerk's opinion, but as a motive why they had thought proper not to get one at this term; I then required whether the court had formed an opinion upon the issue made upon the special verdict; to which he answered that on that and the right of the legislature itself, that the opinion of the court had been against the defendant they would have given it.[10]

Adams' memoirs also describe going to James Madison's presidential inauguration from the Court in the two-hour lunch break from oral argument:

> *March 4.* Going up to the Capitol, I met Mr. Quincy, who was on his way to Georgetown to get a passage to Baltimore. The court met at the usual

hour, and sat until twelve. Mr. Martin continued his argument until that time, and then adjourned until two.

I went to the Capitol, and witnessed the inauguration of Mr. Madison as President of the United States. The House was very much crowded, and its appearance very magnificent. He made a very short speech, in a tone of voice so low that he could not be heard, after which the official oath was administered to him by the Chief-Justice of the United States, the four other Judges of the Supreme Court being present and in their robes. After the ceremony was over I went to pay the visit of custom. The company was received at Mr. Madison's house; he not having yet removed to the President's house. Mr. Jefferson was among the visitors. The Court had adjourned until two o'clock. I therefore returned to them at that hour. Mr. Martin closed the argument in the cause of Fletcher and Peck; after which the Court adjourned. I came home to dinner, and in the evening went with the ladies to a ball at Long's, in honor of the new President. The crowd was excessive—the heat oppressive, and the entertainment bad. Mr. Jefferson was there. About midnight the ball broke up.[11]

The case was set over for further argument in 1810, resulting in Chief Justice Marshall's landmark decision to apply the reasoning of *Marbury v. Madison* to state legislation by way of the Contract Clause. By that time, however, James Madison had offered—and Adams had accepted—the position of Minister to Russia, thereby withdrawing as counsel for Peck. He was replaced by Joseph Story of Massachusetts. Adams would not appear in any U.S. courtroom again until 1841, when he made a significant legal comeback (described below).

Adams' experience arguing before the Court probably did not contribute to his reluctance to accept a position on the high Bench. When Justice Cushing died on September 13, 1810, President Madison attempted to replace him first with Levi Lincoln and then with Alexander Wolcott, both without success. Madison then nominated Adams for that seat on the Supreme Court, and the Senate at once confirmed him, all without his knowledge. From St. Petersburg, Adams turned down the $3,500-a-year job saying, "I am also, and always shall be, too much of a political partisan for a judge."[12] So the Supreme Court appointment ultimately went to Story, who had succeeded him as counsel in *Fletcher v. Peck*.[13] The time lag between Cushing's death and the Story appointment was severely extended by the time required to get word to and from Adams in Russia.

Old Man Eloquent Back to the Court

Adams served as President from 1825 to 1829, losing to Andrew Jackson in the era of the common man. He was elected to the U.S. House of Representatives in 1830, and his 18 years of service there probably represent the best use ever made of the talents of an ex-President. He became known as a Conscience Whig, a group generally from New England that was vocal in opposing slavery before the Civil War. Adams was outspoken on virtually every issue, and was utterly indifferent to political or personal criticism. His last gasp on the floor of the House in February 1848[14] was in opposition to the awarding of medals to certain officers who had served in the Mexican War. (Adams, along with Henry Clay and Representative Abraham Lincoln, had opposed the Mexican War.) He also vigorously and continuously fought the southern-imposed gag rule that prevented anti-slavery petitions from being filed in the House of Representatives.

Adams' credentials as an outspoken opponent of slavery no doubt prompted abolitionist lawyers Lewis Tappan and Roger Sherman

Baldwin to hire him in 1841 to argue before the Supreme Court on behalf of the *Amistad* mutineers. These Africans had been taken as slaves bound for Cuba, but along the way their charismatic leaders mutinied, and eventually the ship was taken into port near Long Island, New York. The Africans were taken into custody in Connecticut, where proceedings were held before U.S. District Judge Andrew Thompson Judson, and, at times, Supreme Court Justice Smith Thompson sitting on circuit. Some of the Africans were indicted by a federal grand jury in Connecticut on charges of piracy and murder. Justice Thompson and Judge Judson convened the federal circuit court, ruled that there was no jurisdiction over the alleged crimes that took place on the high seas in a foreign-owned vessel, and dismissed all criminal charges. At the same session, the circuit court also considered two writs of habeas corpus to release all the Africans from federal custody. Justice Thompson declined to release the Africans because they were subject to possible property claims that were before the U.S. District Court in Connecticut. Judge Judson heard these claims in January 1840 and ordered the Africans returned to their African homeland. By January 1841, the case was before the Supreme Court by virtue of the appeal of U.S. Attorney William Holabird, no doubt acting at the instance of the Van Buren administration.[15] The principal architect of the case in Connecticut was Baldwin, the grandson of Roger Sherman, a key member of the Constitutional Convention from Connecticut. Adams visited the Africans on a trip between Massachusetts and Washington D.C. and met their leader. His memoirs indicate that he was deeply impressed with them and their cause.

The case came up for argument at the time William Henry Harrison and John Tyler were being inaugurated, on March 4, 1841. In those days, lengthy arguments were heard in a single case and often ran for days. Adams argued for the better part of the first day, but Associate Justice Philip Barbour died that night and the argument was postponed until March 3.

Former President John Quincy Adams argued the *Amistad* case before the Supreme Court in 1841. A vociferous opponent of slavery, he eloquently reasoned that the slaveholders, not the African mutineers, were the criminals. Pictured is Joseph Cinquez, leader of the revolt aboard the Spanish slave ship.

This gave Adams more time to worry about his performance. In his diary entry, he prayed, "I implore the mercy of Almighty God so to control my temper, to enlighten my soul, and to give me utterance, that I may prove myself in every respect equal to the task."[16] He later added, "I walked to the Capitol with a thoroughly bewildered mind—so bewildered as to leave me nothing but fervent prayer, that presence of mind may not utterly fail me at the trial I am about to go through."[17]

His memoirs indicate that he was greatly concerned about the precedental value of two mid-1820s decisions of the Supreme Court involving slaves from a ship called *The Antelope.* Those cases had been argued by Francis Scott Key on behalf of the Africans under the sponsorship of the American Colonization Society. Key's principal tenet was that the free blacks from the slave ships should be

returned to their native Africa. Adams conferred with Key about the importance of the *Antelope* precedent, having been involved in the incident first as Secretary of State and later as President.[18] But by 1841, Adams had a different political agenda. He was incensed that Martin Van Buren, in an effort to be re-elected as President, would pander to the southern slavery interests in his own party by appealing an adverse decision made by the federal court in Connecticut. Although Smith Thompson was generally known as being opposed to slavery, Judge Judson was not, and his decision in favor of the Africans had come as something of a surprise.

There is no verbatim transcript of Adams' argument, but he published his own written document—undoubtedly corrected—which is extensive. The case was argued for the United States by Attorney General Henry Gilpin. Gilpin reasoned that Spain's proffered documentation that the Africans were slave property should be accepted. Historian Lynn Hudson Parsons describes Adams' eloquent argument:

> Then came Adams, with a withering attack on the Van Buren administration and the Spanish minister's charge that the Africans were robbers and pirates. "Who were the merchandise and who were the robbers?" he asked. "According to the construction of the Spanish minister, the merchandise were the robbers and the robbers were the merchandise. The merchandise was rescued out of its own hands, and the robbers were rescued out of the hands of the robbers.

Justice Joseph P. Story's decision in the case narrowly concluded:

> Upon the whole, our opinion is, that the decree of the Circuit Court, affirming that of the District Court, ought to be affirmed, except so far as it directs the negroes to be delivered to the President, to be transported to Africa, in pursuance of the act of the 3rd of March 1819; and, as to this, it ought to be reversed: and that the said negroes be declared to be free, and be dismissed from the custody of the Court, and go without delay.[19]

Only Justice Henry Baldwin dissented. No Adams nominee was on the Court in 1841.[20] When Adams brought up the problem of the Africans' return home with Secretary of State Daniel Webster, Webster punted it to President Tyler. The new, slave-owning President was distinctly uninterested in helping the Africans. Adams even tried to get some legislation through Congress to assist in the return of the Africans, but did not succeed. Finally, in November, a group of American missionaries escorted 35 of the Africans on a ship from New York to Sierra Leone.

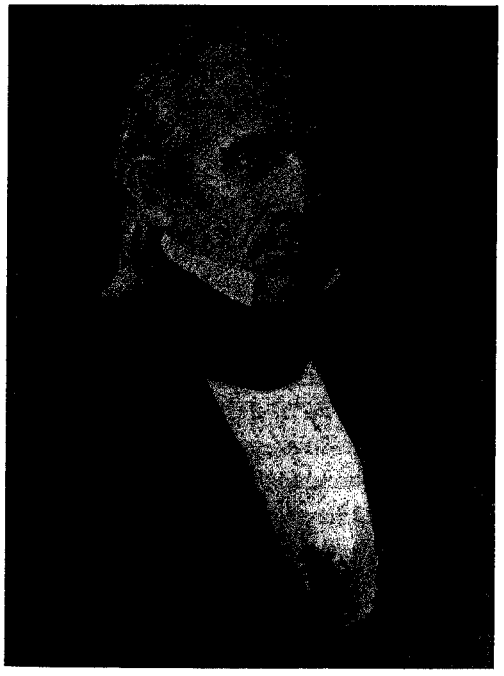
James Polk and the Tennessee Land Litigation

If one happened to stumble onto an obscure Marshall Court opinion in *Williams v. Norris*,[21] it would appear to be of little import. Reading the very tedious description of the controversy would add to that impression. The case involved 1,288 acres of land in Lincoln County, Tennessee, and the interests of the Norris and Williams families. Yet if one gets past the technicalities of 18th- and early 19th-century western land law, this case reflects a major societal problem in the West, especially in western Tennessee. It was representative of what emerged as a major political dispute over land titles in western Tennessee, which eventually struck at the heart of Jacksonian dominance of Tennessee politics.

In 1784, homesteader Ezekiel Norris made a land claim in a public record called the Entry Taker of western land, but the margin of the document stated "detained for nonpayment." The land was then a part of North Carolina, but in 1789 the state ceded its western territory to the United States of America, reserving the right to protect land titles

where the entries had been made according to law. That western territory became the state of Tennessee in 1796. In 1803, the states of North Carolina and Tennessee made a compact that ceded to Tennessee the power to grant and protect titles to all claims of land lying in the state that had previously been reserved by North Carolina. Three years later, Congress ceded to Tennessee all of the rights it retained in western Tennessee, but at the same time drew a north/south line across the state and limited the collection of warrants to lands east of the line. Between 1794 and 1815, Congress passed a series of federal statutes dealing with the process of protecting the title to particular lands.

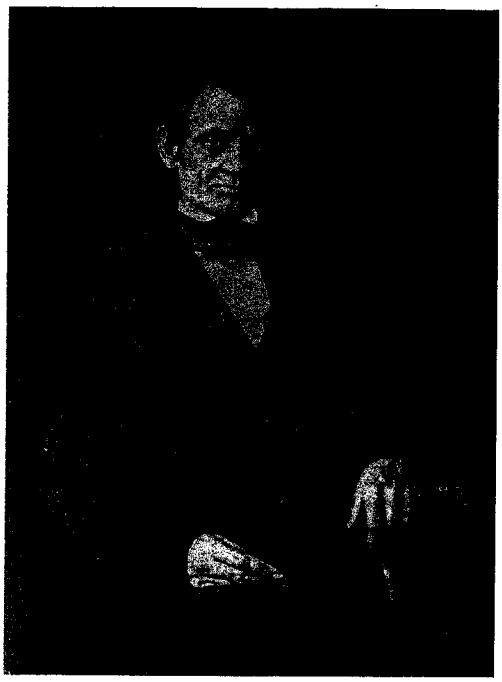
Limiting the area for the collection of specie certificates and land warrants to east Tennessee only did not work. So west Tennessee was opened up for that purpose, and the seeds were sown for a major political battle. Bad records and speculation in warrants were rampant. A person holding a later warrant who had improved land could be evicted as a squatter. Congressman Davy Crockett weighed in by introducing bills to protect the actual occupants of the land and offering to pre-empt land rights to squatters. But, alas, he left the Congress, went west, and died at the Alamo before the bills became law. Norris finally got the legislature of Tennessee to pass a special act to protect his land title, but the special statute was challenged as being in conflict with the Constitution, invoking Section 25 of the Judiciary Act of 1789.



James Polk's only appearance before the Court occurred in 1827, when he represented a Tennessee homesteader in a complex and political case involving land titles. At the time, Polk was representing Tennessee in the U.S. House of Representatives.

The *Norris* case attracted the participation of celebrity counsel. The interests of Oliver Williams in Norris's 1,288 acres were represented by Tennessee Congressman James Knox Polk, along with Thomas Hart Benton, then a United States Senator from Missouri. Polk was a rising star in the House of Representatives, where he was principally known for carrying the political water for Andrew Jackson. Also associated with Jackson, Benton had been a resident of Tennessee before moving to Missouri and becoming its first U.S. Senator, serving for five consecutive terms between 1820 and 1850. Representing the Norris family interest was John Eaton, then a Senator from Tennessee and later Secretary of War. He was married to Peggy Eaton, who became a cause célèbre during one of the Jackson administration's scandals. Eaton's co-counsel was Hugh Lawson White, a Senator from Tennessee who had succeeded Jackson in the Senate and often led the anti-Jackson faction. It would be hard to find four more powerfully placed politicians as counsel in this obscure land case from Tennessee, and their presence in *Norris* says more about the important political and economic issues underlying the case than the published decision of the Supreme Court might indicate.

The case was argued January 11 and 12, 1827. On the first day, Eaton led off for the plaintiffs, followed by Polk for the defendants. The next day, Benton argued for the



Representative Abraham Lincoln argued a minor case before the Supreme Court in 1849. His name is associated with four others, but his participation was probably minimal.

defendants, with White closing for the plaintiffs. The arguments focused on highly technical land-law questions. One question that attracted the Supreme Court's attention was whether the special act of the Tennessee legislature in favor of Norris's land claims violated the Contract Clause, after the fashion of *Fletcher v. Peck*. That issue was raised by Chief Justice John Marshall, but was summarily dismissed. Marshall, for all the Court, decided that it did not have jurisdiction in the land controversy and sent the case back to the supreme court of Tennessee.

In spite of the celebrity status of the counsel, the case settled nothing of the western Tennessee land controversy. As Polk's biographer asserts, "[T]his Tennessee land question was revived from time to time by both Polk and 'Davy' Crockett, and was one of the rocks on which the Jackson party in Tennessee would split into fragments."[22] Polk later served as Speaker of the House for two terms, briefly as governor of Tennessee, and then as President of the United States for a single term from 1845 to 1849. He never appeared before the Supreme Court again.

Abraham Lincoln: A One-Term Illinois Congressman Argues

Thanks to the scholarship of G. Cullom Davis at the Lincoln Legal Papers Project, we now know much about Lincoln's activities as a lawyer between 1836 and 1861. In his recent book, *Lincoln*, David Herbert Donald also gives a good and insightful general analysis of Lincoln's lawyering talents, particularly as a courtroom litigator.[23] Lincoln tried hundreds of jury cases, argued many cases before the supreme court of Illinois, and presented many cases in the federal courts in Springfield and Chicago. During the time Lincoln practiced law, Illinois was in a federal circuit with Indiana, Ohio, and Michigan, and John McLean of Ohio was the Supreme Court Justice riding that circuit. Lincoln and McLean came to know each other well. In fact, Lincoln was employed in the patent case of the Cyrus McCormick reaper, originally filed in Chicago but then transferred by Justice McLean for trial in Cincinnati.[24] Lincoln followed the case to Cincinnati, but was treated badly by other cocounsel, including seasoned advocate Edwin McMaster Stanton and patent lawyer George Harding. Stanton froze Lincoln out of discussions about the reaper case and would not allow him to participate.

Lincoln served a single term as a Whig in the U.S. House of Representatives, from 1847 to 1849. While in Washington, he argued a land-title case, *William Lewis v. Thomas Lewis*,[25] at the time of President Taylor's inauguration. Lincoln was admitted to practice before the Supreme Court on March 7, 1849, the day of the argument, which continued on March 8. Chief Justice Roger B. Taney ruled against Lincoln in *Lewis* on a technical issue of the statute of limitations under the law of Illinois, speaking for the entire Court except Justice McLean, who dissented. (One of the

peculiarities of the Judiciary Act of 1789 was that McLean, who had acted in the case while sitting on the circuit court of Illinois,[26] could act on it again in the Supreme Court.) Lincoln would later support McLean for the Republican presidential nomination in 1856. There is no evidence that Taney's decision contributed to the coolness between the Chief Justice and Lincoln in the late 1850s and early 1860s, but it could not have helped their relationship. Recent scholarship gives Lincoln good grades for his professional competence in his only appearance before the Court.[27]

Although he did not again argue before the Court, Lincoln was hired in four other cases as counsel—perhaps only nominally—that were far more interesting than the *Lewis* case. For example, the *Forsyth*[28] case is historically interesting. Robert Forsyth's father was expelled from Peoria, Illinois, when an American commander burned the town during the War of 1812. Congress later permitted the expelled inhabitants to reclaim their land. Forsyth filed an ejectment to do so. One argument was that Forsyth had made a similar claim under the same federal statute for land in Detroit and was not entitled to "double-dip." Lincoln's name got associated with the case on a printed argument for Forsyth that Lincoln likely did not prepare. Salmon P. Chase argued the case against Forsyth and lost. Lincoln planned to argue more cases before the Supreme Court, but the presidential nomination and election in 1860 drew his focus instead.

James A. Garfield: Starting at the Top

Of all the subjects of this article, James A. Garfield is the greatest surprise. He was an ordained Christian minister and a follower and admirer of Alexander Campbell, the progressive Presbyterian minister who founded the Disciples of Christ in 1810. Campbell helped found Hiram College in Ohio and installed Garfield as its president.[29] At the outset of the Civil War, Garfield was admitted to practice in Ohio before the state supreme court, but there is no evidence of any serious legal practice. He served with distinction in the Union Army, became a breveted major general, and just after the Civil War was elected to the U.S. House of Representatives, where he stayed until he became President in 1881.

In 1866, while a Republican member of the House, Garfield joined David Dudley Field, Joseph E. McDonald, and Jeremiah S. Smith in representing Lambdin P. Milligan before the Supreme Court. A civilian who was tried by a military commission and convicted of conspiracy, Milligan was sentenced to death for his involvement in a plot to release and arm Confederate prisoners so they could participate in the invasion of Indiana. Garfield's cocounsels were all distinguished lawyers. Field, a successful New York lawyer, was the eldest brother of Stephen J. Field, a member of the Supreme Court who remained in the case. McDonald had been attorney general of Indiana and was later to serve in the U.S. Senate. A fellow Disciple of Christ, Smith had served as Attorney General and Secretary of State in the Buchanan administration, and had remained loyal to both the Union and the Democratic Party.

Garfield was admitted to practice before the Supreme Court at the outset of the weeklong arguments in *Ex parte Milligan*.[30] He argued after Field, spending most of one day on a historical analysis of the uses of military commissions and martial law since 1322. His conclusion is worth restating:

> Your decision will mark an era in American history. The just and final settlement of this great question will take a high place among the great achievements which have immortalized this decade. It will establish forever this truth, of inestimable value to us and to mankind, that a Republic can wield the vast enginery of war without breaking down the safeguards of liberty: can suppress insurrection and put down rebellion,

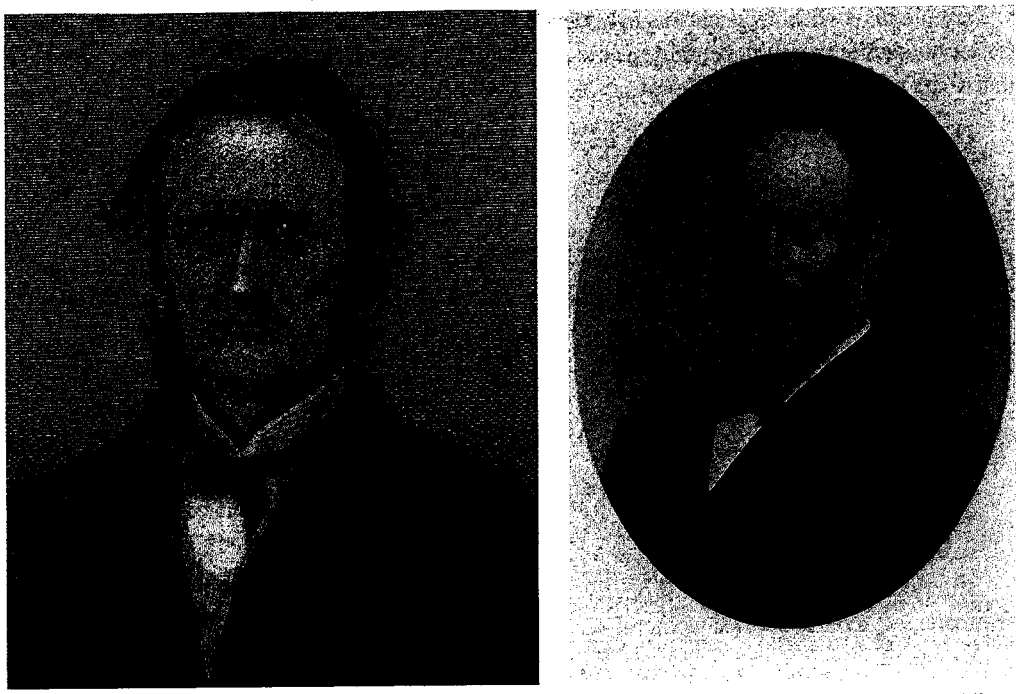
however formidable, without destroying the bulwarks of law, can, by the might of its armed millions, preserve and defend both nationality and liberty. Victories on the field were of priceless value, for they plucked the life of the Republic out of the hands of its enemies; but

Peace hath her victories
No less renowned than war;

and if the protection of law shall, by your decision, be extended over every acre of our peaceful territory, you will have rendered the great decision of the century.[31]

The government was represented by Attorney General James Speed, Henry Stanbery, and the colorful and somewhat infamous Benjamin F. Butler of Massachusetts, an erstwhile general in the Union Army. Garfield enjoyed the good will of Chief Justice Salmon P. Chase, also from Ohio, who described him as a "young, brilliant, and rising public man." Garfield and Chase played chess, which brings to mind Chief Justice Fred Vinson and President Harry S Truman playing poker together a century later.[32]

The Court unanimously agreed that Milligan should be released from the Ohio State Penitentiary, where he had been held since late 1864 under the decision of a 12-member Union Army military commission acting in Indianapolis. However, the Court divided 4 to 4 on the reason. Justice David Davis, Lincoln's long-time friend and campaign manager, wrote the better-known opinion, holding that the use of military commissions involving civilians and certain offenses in places outside of the military battle area where state and federal courts were functioning was a violation of the Due Process Clause of the Fifth Amendment. Davis was joined by Justices Field, Samuel Nelson, and



In 1866 Congressman James A. Garfield was one of several counsel who represented Lambdin P. Milligan (left), a civilian sentenced to death for his involvement in a plot to release and arm Confederate prisoners so they could participate in the invasion of Indiana. Garfield (right) spent most of his argument on a historical analysis of the uses of military commissions and martial law since 1322.

Nathan Clifford. Chief Justice Chase agreed that Milligan should be released, on the ground that Congress could subject citizens to military trials during wartime but had not given proper authorization in this case. Chase was joined by Justices James Moore Wayne, Noah Swayne, and Samuel F. Miller. Lincoln's Court appointees—Davis, Field, Swayne, Miller, and Chase—were thus divided on the issue.

Although Garfield's arguments prevailed, the case had a negative political downside. Milligan, now freed, was branded by the Radical Republicans as a Copperhead and a traitor. He was later portrayed as such in a civil trial for damages that he brought against his accusers. Milligan was represented by Thomas A. Hendricks, the future Vice President, while his accusers were represented by Indianapolis lawyer and future President Benjamin Harrison. In his final argument in that civil trial in May 1871, Harrison labeled Milligan an unqualified traitor.[33]

These facts presented a real political dilemma for Garfield, and he had to make peace with the Radical Republicans in his congressional district in Ohio. On this, his biographer states:

> Garfield might be charged with betraying his party, but no one could accuse him of selling out. He never made a cent out of the Milligan case, even though his clients included some of the wealthiest men in Indiana. From time to time, whenever he was strapped for cash, he would dun Milligan and his friends for payment, but his appeals were ignored. The experience, however, was more valuable than any fee. Garfield had won an overnight reputation as a constitutional lawyer which, if properly managed, could nourish a lucrative career.[34]

The analysis of Garfield's biographer is borne out in the 13 cases (two of which were printed arguments) that he handled from 1866 to 1880 in the Supreme Court after *Milligan*. Representative Garfield regularly appeared with or against some of the best Supreme Court advocates of the time, including: the aforementioned David Dudley Field; Ebenezer Rockwood Hoar, then Attorney General of the United States; Benjamin H. Bristow, the first Solicitor General; Michael C. Kerr, a United States Representative from Indiana and one-time Speaker of the House; and Solicitor General Samuel F. Phillips.[35]

Some of the cases Garfield appealed were insignificant, while others touched on important legal and historic events. In 1869, he represented a landowner in *Bennett v. Hunter*,[36] contesting a post–Civil War property tax that Congress had imposed. The Congressional act provided that if the tax was not paid, the property was subject to forfeiture and sale by the United States. The Supreme Court found for Garfield's client, determining that the tender of the full amount of taxes, penalty, and interest prior to the tax sale must be accepted by the United States—which rendered forfeiture in any later sale of the property by the United States null and void.

In *Henderson's Distillery Spirits*,[37] the United States prosecuted a forfeiture action and seized spirits purchased by Henderson's from a bonded warehouse because the taxes imposed on the production of spirits had not been paid by the distillery. The United States maintained this forfeiture action and seizure of spirits despite Henderson's having made a lawful purchase of the spirits from a bonded warehouse. The Court rejected Garfield's argument, which was based on old and obscure common-law concepts. The *Henderson's* case drew a dissent from Chief Justice Waite and Justices Field and Miller.

Notwithstanding Garfield's deep religious and church ties, on at least two occasions he represented the Baltimore and Potomac Railroad Company against the Trustees of the Sixth Presbyterian Church. In 1873, the case involved a jury verdict of $11,500 by the church against the railroad for damages resulting from

the company's use of a road in front of the church property.[38] The highest court in the District of Columbia upheld, and the issue came before the Supreme Court, where the church argued that it was without jurisdiction to entertain the appeal. Garfield argued for the railroad that the Court did have jurisdiction pursuant to an act of Congress. The Court denied the church's motion to dismiss on that basis. Garfield was next hired by the railroad in a case where the church sought compensation for injuries resulting from the railroad's use of a depot building near a church and the running of trains to and from it.[39] The railroad argued that the assessment of damages was not authorized by law, and the Court, on a procedural technicality, declined to examine the question of the assessment of damages.

In a case from the Indiana circuit court, Garfield represented the appellant in *Putnam v. Day*, this time *against* the railroad.[40] Putnam had obtained a judgment against a railroad company in Floyd County, Indiana. Garfield was able to preserve that judgment before the Supreme Court. In a case from Michigan, Garfield was hired by a township that wanted to issue bonds for the construction of a railroad. The federal court in Michigan disallowed it, and the Supreme Court upheld. Justices Miller and Davis dissented in favor of Garfield's position. Although it was argued under the Michigan state constitution, this case, *Pine Grove v. Talcott*,[41] may have been an early glimpse of substantive due process.

In 1876, Garfield was involved in two insurance cases. In *Hoffman v. John Hancock Mutual Life Ins. Co.*,[42] he represented Frederick Hoffman's widow in an attempt to enforce a premium collected by an agent for a life-insurance policy. The facts in this case surely made a man as serious as Garfield smile. Here, the agent, instead of collecting cash for the premium, received a horse worth $400. The Supreme Court was not amused, however, and ruled that life insurance is primarily a cash business and that the acceptance of the horse in lieu of cash amounted to an *ultra vires* act and a fraud by the agent on the company. The other insurance case involved both New York Life Insurance Company and Manhattan Life Insurance Company[43] for policies issued before the Civil War. Garfield represented the insurance companies in an appeal from the federal circuit court in Mississippi. The Supreme Court, in an important decision for the insurance industry of the time, determined that an action could not be maintained for the amount assured on a life-insurance policy forfeited for nonpayment of the premium, even though the war prevented the insured from making the payment. However, the Court did find that the purchaser of the policy had a right to the equitable value of the policy with interest from the close of the war.

Less successfully, Garfield represented an employee of the Government Printing Office seeking additional compensation under a resolution of Congress that went into effect in 1867. The Court of Claims had granted additional compensation to the employee, named Allison, but the Supreme Court reversed,[44] determining that Allison and other employees were not covered under the resolution and would therefore have to forfeit the additional compensation.

Another of Garfield's cases pertained to the location of the county seat of Mahoning County in Ohio, which had been changed from the small town of Canfield to Youngstown. In spite of Garfield's best efforts, arguing under the Contract Clause, the Supreme Court would not wade into this local fight.[45] Similarly, in *Potts v. Chumasero*,[46] Garfield represented the Governor, secretary and marshal of the Montana Territory against certain citizens, most of whom lived in or around Helena and were attempting to move the territorial capital from Virginia City to Helena. After a state election on the subject, the Supreme Court of Montana Territory issued a mandate requiring a recount in two of the counties in that territory, because the vote showed a majority against removal of the seat. After the recount, the vote showed a majority in favor of the removal.

Garfield represented the Governor, secretary, and marshal of the Montana Territory against citizens attempting to move the territorial capital from Virginia City to Helena (pictured) in 1876.

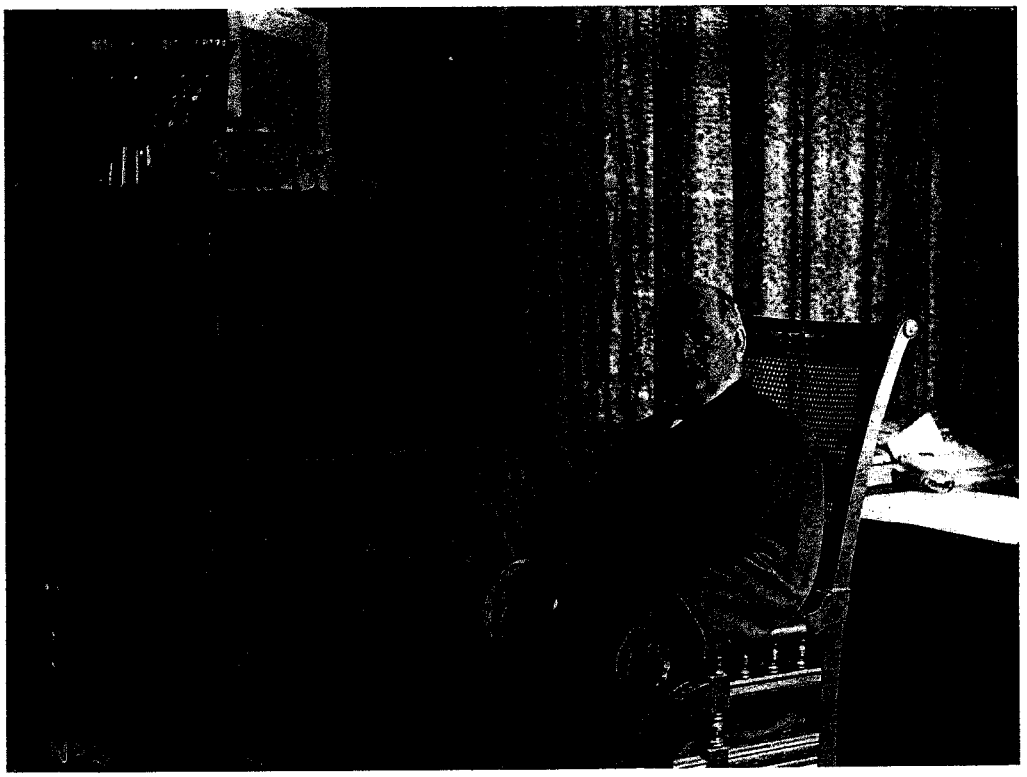
As in the Ohio county seat case, the Supreme Court sidestepped the issue, throwing out the case on the basis of a statute that required the amount in controversy to be more than $1,000. The Supreme Court held that none of the governmental officials were at risk of losing any money, and, therefore, the Court was without jurisdiction to hear the case.

It is interesting to note that for a brief time in 1872, Garfield and Benjamin Harrison were on record as opposing counsel in the same case. Unfortunately for history, Garfield's obligations on the House floor prevented any direct confrontation between these two future Presidents in the Courtroom.[47] A victim of assassination, Garfield would serve only six months as President in 1881.

Grover Cleveland: Between Presidencies

Grover Cleveland commenced his political career in Buffalo, New York as sheriff, became Governor, and then, in 1884, President of the United States. He lost narrowly in 1888 to Benjamin Harrison, but did not return to Buffalo. Rather, he established himself with the Bangs, Stetson, Tracy & MacVeagh law firm in New York City, where he mainly did office work and mediation and became friendly with J. Pierpoint Morgan and other wealthy clients of the firm. He was not a partner, but was "of counsel." Cleveland argued one minor case before the Supreme Court of the United States in 1891. In doing so, he became the first former President to argue before members of the Court—in this case, Chief Justice Melville Fuller and Justice Lucius Q. C. Lamar—whom he had himself appointed.

The case was of no large importance, involving a bond issue in the city of New Orleans.[48] Cleveland appeared for John Crossly & Sons, Ltd., who were holders of

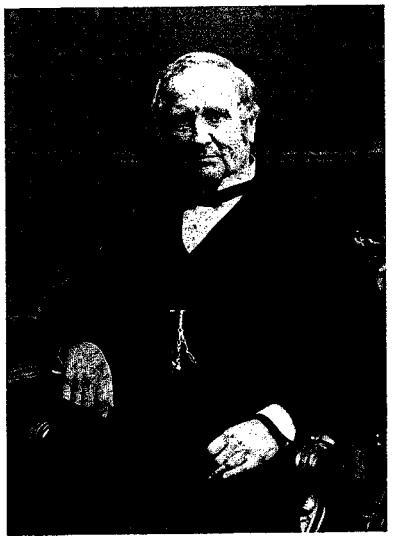


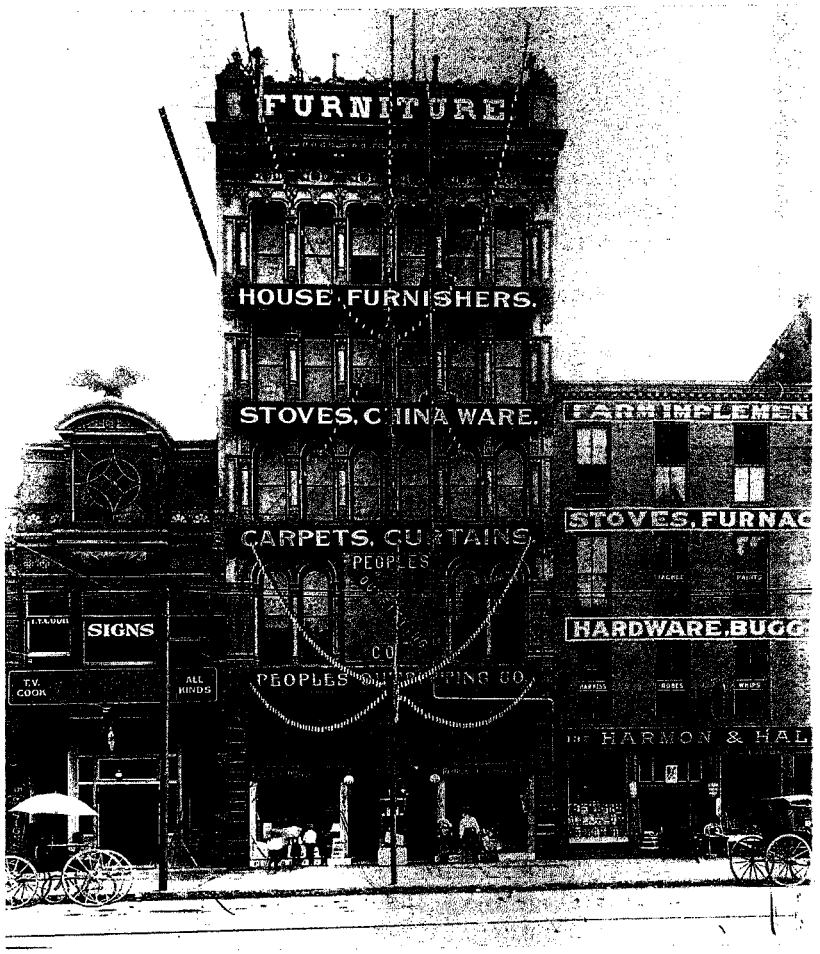
Grover Cleveland argued one minor case before the Supreme Court in 1891, marking the first time a former President argued before Justices he had appointed. Cleveland's two appointees, Chief Justice Melville W. Fuller and Justice Lucius Q. C. Lamar, both voted against his arguments.

certain drainage warrants. Justice David Brewer wrote an extended opinion affirming, but Justice John Marshall Harlan dissented at length, with Chief Justice Fuller and Justice Lamar joining the dissent. Pressure to side with the President who appointed them was thus not an obstacle for the Cleveland appointees. Justice Henry Billings Brown had recused himself, so the vote was 5–3. Interestingly, Cleveland was in regular correspondence with Chief Justice Fuller and gave ex parte comment to Fuller about the case's aftermath.[49] But the press made no particular issue of the fact that for the first time in history, a former President had argued a case as a lawyer before a Supreme Court that included members he had appointed. Perhaps if the case had been of larger import, the notion of a potential conflict of interest would have been raised.

Benjamin Harrison: Lawyer-Senator

In **The Harrisons**, Ross F. Lockridge, Jr. outlines how a remarkable transformation occurred during four generations of the Harrison family. The first Benjamin Harrison, "The Signer," was a part of the aristocratic, slave-owning plantation society of the James and York Rivers in Virginia, a member of the Continental Congress, a signer of the Declaration of Independence, and the Governor of Virginia just as the War of Independence was coming to an end. The Signer's younger son, William Henry Harrison, was governor of the Indiana Territory, a war hero of sorts, and—for 30 days—President of the United States. William Henry's son, John Scott Harrison, was a Whig member of the House of Representatives from Ohio in the mid-19th century. But Representative Harrison's son, the second





Former President Benjamin Harrison (left) represented Lambdin Milligan's accusers—not before the Supreme Court, but in an Indiana common-law damage case. Thomas A. Hendricks (right), a powerful Democratic lawyer who had served in the Indiana legislature and in both Houses of the U.S. Congress, represented Milligan. Harrison and Hendricks were simultaneously opposing each other in a case before the Supreme Court involving an injunction requested by the taxpayers of New Albany, Indiana (above) to enjoin the city from paying interest on bonds issued to construct a railroad.

Benjamin Harrison, was unlike his politically oriented forbears. He was a man of his craft—lawyering.

Harrison studied law in Cincinnati in the office of Bellamy Storer, a former Whig Congressman. He "kept his nose to the grindstone," which greatly pleased Storer, who played a role in forming Harrison's legal talents similar to the one Stephen T. Logan exercised with young Abraham Lincoln. In the 1860 election, running as a Republican, Harrison was elected to the office of Reporter of the Supreme Court of Indiana, then a statewide, elected office. The job provided no compensation except for what money could be made printing and selling the official reports. The Reporter was also permitted to engage in the private practice of law, and Harrison became a first-rate litigator. But he resigned his position and enlisted in the Union Army when war broke out during his first term.

Like Garfield, Harrison was also involved in the case of Milligan, the Indiana lawyer who was tried in 1864 for antiwar activities and sentenced to death by a military commission. After the Supreme Court unanimously ordered Milligan to be set free, he returned to his Indiana home and, appearing *pro se*, filed a state common-pleas damage case primarily based upon common-law principles of false arrest and false imprisonment. The defendants in the case included the 12 military commission members, witnesses against Milligan, and such prominent persons as former Indiana governor Oliver P. Morton, now a U.S. Senator, and former Chief of Staff of the Army Ulysses S. Grant, now the President of the United States. The case was transferred to the U.S. Circuit Court in Indianapolis, where Judge Thomas Drummond of Chicago presided over the trial.

Milligan was represented by a powerful Democratic lawyer, Thomas A. Hendricks, who had served in the Indiana legislature and in both Houses of the United States Congress. President Grant sought out "General" Harrison (as he was referred to by the Court and other counsel) to lead the defense of this case, which really became a civil-rights jury trial, claiming money damages for a violation of the U.S. Constitution. As such, it was a first.[50]

The trial occurred in May 1871, receiving massive media coverage, including verbatim reporting of testimony on the front pages of the leading Indianapolis newspapers. The case went to the jury on the evening before Decoration (Memorial) Day, May 30, 1871. The jury deliberated all night, returning a verdict at 11:00 A.M. After a two-week trial and massive numbers of witnesses and evidence, the verdict for Milligan was $5.00 and costs, although a reading of the transcript indicates that Milligan never collected either.

While Harrison and Hendricks were contesting in a federal courtroom in Indianapolis, they were also doing so in the Supreme Court of the United States. In *New Albany v. Burke*,[51] Hendricks represented the taxpayers in New Albany, Indiana, to enjoin the city from paying interest on bonds issued to construct a railroad. Harrison represented New Albany. The U.S. Circuit Court in Indiana had issued an injunction requested by the taxpayers. The Supreme Court reversed and ruled against them. Thus, Harrison prevailed in his first case before the nation's highest court.

Harrison's next case, *Burke v. Smith*, involved subscribers to stock in a railroad corporation in Indiana and whether the railroad could be held liable for amounts in excess of the face amount of their subscription. The railroad had become insolvent and wanted to require the stock subscribers to pay more. Harrison argued for the railroad; the subscribers were represented by Indiana Congressman Michael Kerr and James A. Garfield. Thus, two future Presidents were opposing counsel in the same case; however, as noted above, Garfield did not actually argue the case.

Harrison had another interesting opponent in *Kennedy v. Indianapolis*.[52] David Turpie, who would later defeat Harrison in his reelection bid for the U.S. Senate in 1887, was opposing counsel and prevailed over Harrison in this case also. In *Kennedy*, Chief Justice Waite ruled that a general internal-improvement

statute did not violate the Takings Clause of the Fifth Amendment.

Harrison was elected by the Indiana General Assembly to the U.S. Senate in early 1881. He received a note from Judge Thomas Drummond saying, "I don't like to see a lawyer like you leave his profession and go into politics." The Supreme Court was housed in the Capitol, and Senator Harrison was present in the Courtroom when the landmark civil rights cases of 1883 were decided. He strongly disagreed with the decision and said so in a later speech to a racially mixed audience in the Second Baptist Church. Notwithstanding his Virginia origins, Harrison took the view of the Radical Republicans at the time on issues of race and reconstruction. He endorsed the Civil Rights Act of 1875, and, as President, would strongly support federal legislation to protect the voting rights of southern blacks under the Fifteenth Amendment.

As Senator, Harrison continued to practice law, and he argued six cases before the Supreme Court. In *Evansville Bank v. Britton*,[53] he was again opposed by Hendricks, who appeared for the bank, with Harrison for Britton. Justice Samuel F. Miller wrote the majority opinion in favor of Harrison's interest, with Chief Justice Waite, Joseph P. Bradley, and Horace Gray dissenting. Miller ruled that under Indiana statute, the taxation of national bank shares without permitting their owner to deduct the amount of bona fide indebtedness from their assessed value was a discrimination forbidden by an act of Congress.

Two years later, Harrison's arguments prevailed again in *Warren v. King*,[54] a case involving the foreclosure of two railroad mortgages, and in *Indiana Southern R. Co. v. Liverpool, London, and Globe Ins. Co.*[55] In that case, Samuel J. Tilden (the Democratic presidential candidate in 1876) was trustee for the issuance of a million and a half dollars in bonds held by the insurance company. The underlying issue had to do with foreclosure, and Chief Justice Waite wrote the opinion for a unanimous Court affirming the decision of the federal circuit court in Indiana.

In 1884, Harrison argued *Dimpfal v. Ohio and Mississippi Railroad Co.*,[56] in which he represented the Farmers Loan and Trust Company as an appellee. The case involved an equitable action by a small minority of stockholders and a question of *ultra vires*. The Supreme Court held that the objecting minority stockholders had to exhaust all means to obtain redress of their grievances within the corporation and that they had not done so.

Near the end of his one term in the Senate, Harrison argued *Smith v. Craft*[57] and *Jewell v. Knight*,[58] two cases that were combined for argument and decision. Here, Harrison was opposed by Joseph E. McDonald, former U.S. Senator from Indiana. Both cases involved minor debtor/creditor issues. Justice Gray wrote an opinion dismissing these appeals, which had been brought by Harrison.

Harrison's biographer Lockridge characterizes Harrison's extraordinary legal ability in the years before his presidency:

> Thus, during the period from 1854 to 1888, despite the interruptions of war, political office and strenuous campaigning, Harrison had remained first and foremost a lawyer. He had steadily grown in ability until he was recognized as one of the ablest lawyers of his time.[59]

Harrison served as President for one term, from 1889 to 1893.

Lawyering Ex-President

The most visible activity in which Harrison engaged as a lawyer after his presidency was to act as chief counsel for the government of Venezuela in a boundary dispute with British Guiana in South America. He took a hard-nosed attitude in fixing the fee with the Venezuelan government, insisting upon and receiving a retainer of $20,000 and quarterly payments of $10,000 until the Arbitration Tribunal in Paris rendered its decision in 1899.

In all, he earned an $80,000 fee. Harrison took an active role in developing the factual record, which then was followed by lengthy oral arguments before the tribunal. That tribunal included two American judges, Chief Justice Fuller and Justice Brewer (the latter appointed to the Supreme Court by Harrison in 1890), and was chaired by a Russian judge. The conclusion to this enormous effort was a final argument lasting 25 hours and spanning five days. Much to the consternation of Harrison and his legal entourage, the tribunal ruled in favor of the British contentions. Harrison may have been correct that the decision was driven by European power politics rather than international law.[60]

An objective view of Harrison's performance as a lawyer on this international stage is offered by Willard L. King, biographer to Chief Justice Fuller. His separate chapter on this international boundary dispute as it finally played out in Paris describes Harrison as "probably the ablest lawyer ever to be President." This conclusion is supported by a statement by Roland Gray, who was Fuller's secretary in Paris:

> I never heard him argue in Washington and he did not appear very well in Paris. But my uncle [Justice Horace Gray] once said to me that in his opinion, the four ablest counsels who argued before him in Washington were Mr. James Carter, Mr. Joseph Choate, Mr. John Johnson of Philadelphia, and President Harrison.[61]

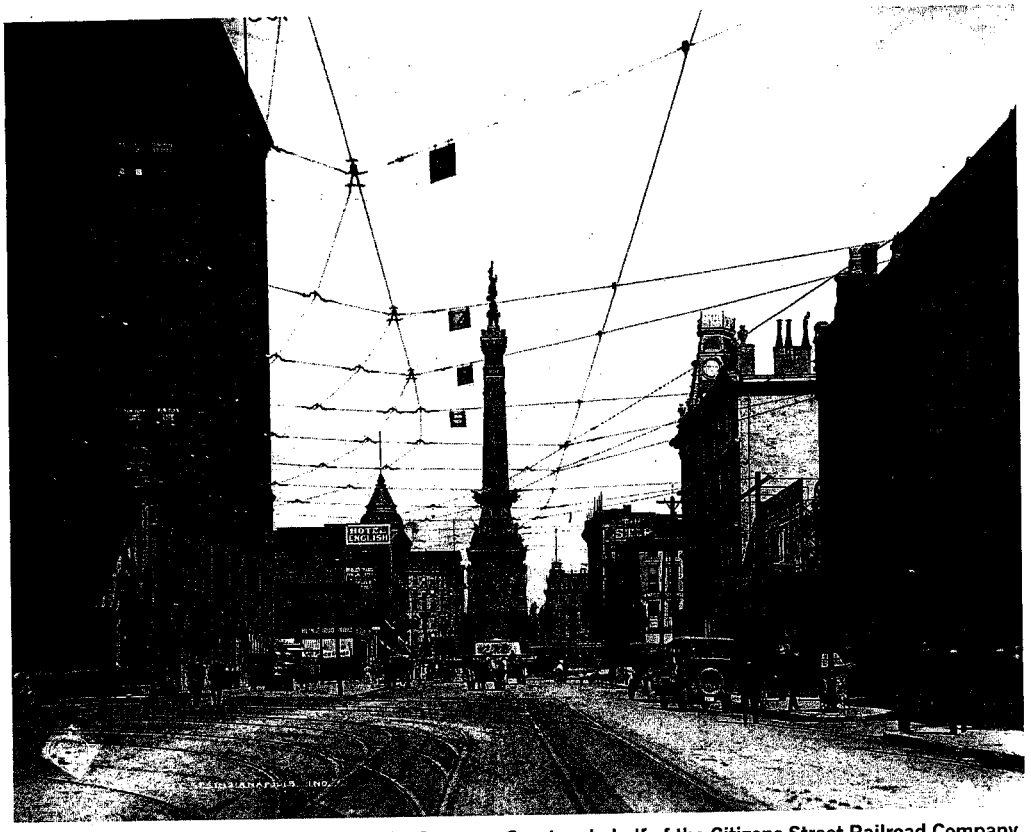
Ex-President Harrison also argued six cases before the Supreme Court between 1896 and 1898. At that time, the Court included Justices Brewer, Brown, and George Shiras, all nominated by Harrison. (A fourth appointee, Howell E. Jackson, had died in 1895.) The pages of *The New York Times* during this period contain numerous references to Harrison's lawyering activities, but, as with former President Cleveland, no question was raised in the press about the propriety of an ex-President appearing before a Supreme Court to which he had appointed members. Perhaps Harrison's talents as a lawyer were so generally recognized as to stave off any negative comment.

Indeed, in 1896 a one-paragraph story appeared on the front page of *The New York Times* confirming Harrison's reputation as a top advocate:

> At the last meeting of the Indiana Tax Commissioners, it was voted to secure, if possible, the services of ex-President Harrison to make an argument in the Supreme Court in behalf of the State of Indiana to enforce payment of taxes assessed against the expressed companies. The Commissioners learned that he would not appear for a fee of less than $5,000. In the California Irrigation cases, he received $10,000. His largest fee was received two years ago from the Indianapolis Street Railway. It was $25,000. In the Morrison will case, at Richmond, Ind., he received $19,000.[62]

The cases Harrison argued so lucratively during this post-Presidential period were: *Fallbrook Irrigation District v. Bradley*,[63] *Tregea v. Modesto Irrigation District*,[64] *Forsyth v. City of Hammond*,[65] *City Ry. Co. v. Citizens State Railroad Co.*,[66] *Magoun v. Illinois Trust & Savings Bank*,[67] and *Sawyer v. Kochersperger*.[68] *Fallbrook* was argued the same day as *Tregea*.[69] Harrison's opponent in these companion California irrigation cases was one of the great lawyers of the time, Joseph H. Choate. The cases involved the taking of private property for public use, as well as a due process issue about how property could be included in a local improvement district. Harrison was well paid and prevailed in these landmark cases, which were crucial in the development and regulation of water resources in the West.

The *City of Hammond* case came from the federal court in Indianapolis and had to do with



In 1897, Harrison argued a case before the Supreme Court on behalf of the Citizens Street Railroad Company, which sought to operate a railroad on the streets of Indianapolis where it had constructed its tracks. Harrison earned $25,000 for his services, a substantial sum in those days.

a reading of Article IV, Section 4 of the Constitution and the guarantee of a Republican form of government. The Supreme Court decided that a state might let a court determine municipal boundaries without running afoul of the Constitution.

The *Citizens* case was argued on March 16 and 17, 1897. Philander C. Knox, later Attorney General, argued with Harrison for the appellee. The case involved the construction, operation, and maintenance of a streetcar system in the city of Indianapolis and concerned the authority of a Citizens Street Railroad Company to operate a railroad on the streets where it had constructed its tracks. There was a question of the validity of an ordinance to that effect. In a somewhat complicated decision, Harrison's arguments prevailed. The economic interests were substantial and, as the *Times* noted, he earned $25,000 for his services.

In *Magoun*, Harrison challenged the constitutionality of an Illinois inheritance tax law under the Equal Protection Clause of the Fourteenth Amendment, earning a $5,000 fee. The Court majority rejected his argument on the ground that the state prescribed different treatment for lineal relations, collateral kindred, and unrelated persons, in increasing proportionate burden of tax as the amount of benefit increases. The *Sawyer* case represented an unsuccessful effort by a Cook County, Illinois tax collector to remove to the Supreme Court of the United States a state court case involving a defendant who refused, on constitutional grounds, to pay taxes. In 1895, Harrison appeared in extended litigation over the will of James L. Morrison, a wealthy banker in Richmond, Indiana, and earned a $25,000 fee.

Writing in 1916, in his three-volume **Courts and Lawyers of Indiana**, Indiana

Supreme Court Justice Leander Monks said of Harrison: "As a lawyer, in its broad and best sense, he was considered second to no one in America."[70] In **My Memories of Eighty Years** (1924), Chauncey M. Depew, a longtime U.S. Senator and political powerhouse, echoed this appraisal: "General Harrison was by far the ablest and profoundest lawyer among our Presidents.... He retired from office, like many of our Presidents, a comparatively poor man. After retirement, he entered at once upon the practice of his profession of the law and almost immediately became recognized as one of the leaders of the American Bar."[71]

William Howard Taft: Fresh from Ohio

William Howard Taft was part of the tightly knit political organization of Ohio Governor Joseph B. Foraker that helped to carry the state to make Benjamin Harrison President in the 1888 election. The organization provided Taft a judgeship on the Ohio Superior Court in Cincinnati. Not yet 30, he was greatly pleased. In January 1890, Orlow W. Chapman, the Solicitor General of the United States, died. Foraker personally lobbied President Harrison for Taft to be Chapman's successor. Taft arrived by train the following month to take up his duties, arguing the government's cases before the Supreme Court and handling a bundle of other administrative and statutory responsibilities.[72]

Taft's many biographies give different numbers of cases he handled while Solicitor General. Henry F. Pringle suggests he argued 18, but Herbert S. Duffy says that there were 27. Thirty-six published opinions of cases Taft argued have been found, and there were several pairs of cases handled together. The exact number of oral arguments is not known, but it is certain that Taft had hands-on involvement in all of them and that at least two are of considerable note.

When William H. Seward negotiated the treaty for the purchase of Alaska in 1867, there was a failure to define the exact boundaries of the Bering Sea. As a result, disputes arose against Canadian and British nationals harvesting the abundant seals of that area. Their sealing ships were being taken into Alaskan federal courts and forfeited. The position of Secretary of State James G. Blaine was that the United States had all of the authority in the Bering Sea that Russia had exercised, even though that had not been spelled out specifically in the treaty. (Historians say that Seward was too anxious to get the treaty signed before the deal fell through to sort out the details.)

The British authorities attempted to do an end run around diplomatic procedures by getting into the Supreme Court in an admiralty case involving the *W. P. Sayward*, a Canadian sailing schooner engaged in the seal trade and owned by a British citizen. It had been seized by a United States revenue cutter, and the federal court in Alaska had forfeited and condemned it. The British and Canadian interests employed Supreme Court advocate Joseph H. Choate to represent them along with the Attorney General of Canada, Sir John Thompson. Taft represented the United States, although Attorney General William Miller's name is also listed. Miller's health was fragile and it is unlikely he played a role in this advocacy.

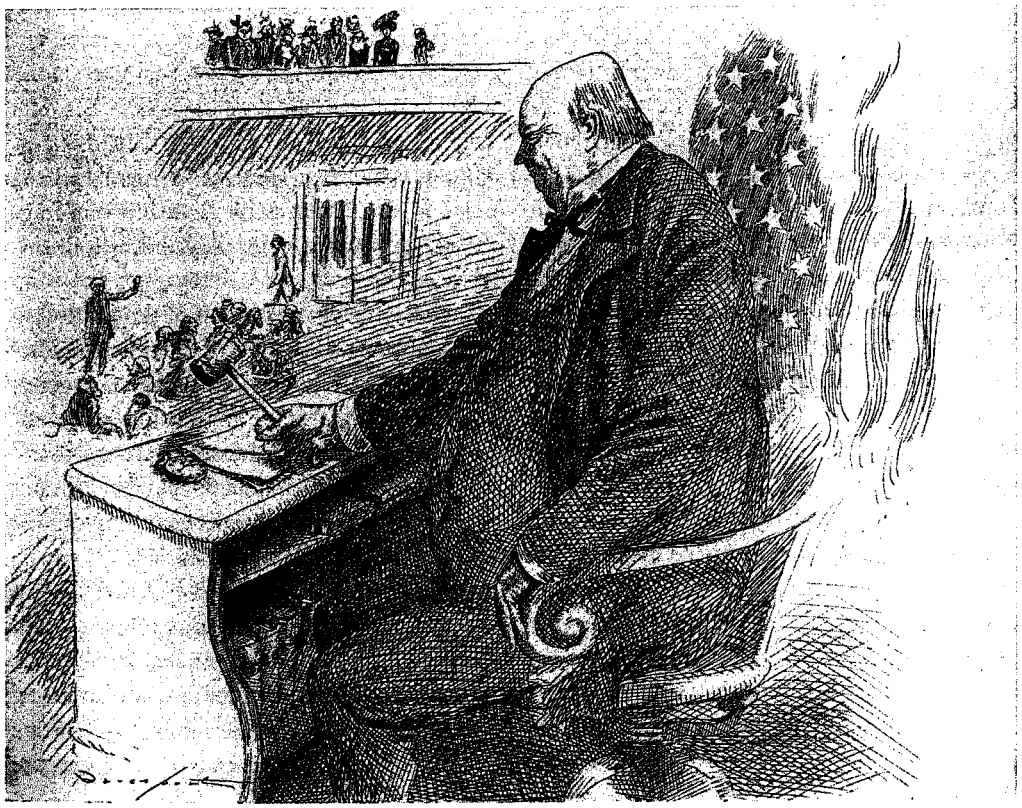
Choate advanced a writ of prohibition to undermine the exercise of admiralty jurisdiction by the U.S. courts in Alaska. Taft countered, reasoning that the application "to a court to review the action of the political department of the government upon a question between it and a foreign power, made while diplomatic negotiations were going on, should be denied." The Supreme Court agreed.[73] Chief Justice Fuller wrote the 1892 opinion; Justice Field alone dissented without opinion. The Taft argument and the Fuller opinion advanced along lines that were further developed by Justice George Sutherland in *Curtiss-Wright* 45 years later.[74]

Taft was a huge man, and he soon became involved with another large-bodied man by the name of Thomas Brackett Reed[75] of Maine. In

1889, Reed had persuaded the majority of the Republican caucus in the U.S. House of Representatives to put him, rather than the very popular William McKinley of Ohio, forward as Speaker. Although Taft and Reed were similar in physical structure, they were vastly different in temperament. Both were brilliant, to be sure. But the comparison largely stopped there. Reed was supremely sophisticated, sarcastic, and at times mean-spirited. He was highly literate and kept a diary in French. He was also the most gifted parliamentarian to serve as Speaker in the 19th century. Taft was always considered affable and lovable. These two big men were thrown together in an interesting Supreme Court case in 1891, while Taft was Solicitor General.

Before the advent of "Czar" Reed's speakership, a tactic used regularly in the House of Representatives was for members to refuse to answer the roll call and thus prevent a quorum for the dispatch of legislative business. Apparently, both parties, when out of power, used some version of this tactic. When Reed became Speaker, he did a frontal assault on this practice by merely having the Clerk note as present those members of the House who were there, even though they refused to answer roll call. That rule, known as House Rule XV, was as follows:

> On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the



House of Representatives Speaker Tom Reed (above) squashed the practice of members refusing to answer roll call to prevent a quorum for the dispatch of legislative business by having the Clerk note them present anyway. As Solicitor General, William Howard Taft argued the government's position when the Supreme Court reviewed this practice in 1891.

> names of the members voting, and be counted and announced in determining the presence of a quorum to do business.

The rule came under review before the Supreme Court under an act adopted on May 9, 1890 classifying worsted cloth as woolens. One of the two issues raised was the way the Speaker had counted a quorum. The importer contested the constitutionality of the act on the ground that it was not passed by a quorum within the meaning of the Constitution. On February 29, 1892, Justice Brewer, speaking for a unanimous Court, ruled that because the *Journal* recorded that a majority was present, and under the Constitution a majority constituted a quorum, then a majority of that quorum had voted in favor of the act.[76] Since the act had been legally passed in the House, Reed's rule and practice were valid. A close reading of Brewer's opinion, however, reveals that Reed's action in counting a quorum in 1890 was not the issue before the Court. Instead, it was the validity of the rule by which the Speaker was authorized to count a quorum that was tested. In any case, the delaying tactic of breaking a quorum was given a decent judicial burial.

It has already been recounted how, when young John Quincy Adams was in the U.S. Senate and observed the Marshall Court in action, he was in awe. Not so with Taft. He wrote to his father:

> I have difficulty in holding the attention of the court. They seem to think when I begin to talk that that is a good chance to read all the letters that have been waiting for them, to eat lunch, and to devote their attention to correcting proof[s], and other matters that have been delayed until my speech. However, I expect to gain a good deal of practice in addressing a lot of mummies and experience in not being overcome by circumstances.[77]

Solicitor General Taft had the opportunity to appear as an adversary against some of the greatest lawyers of the time, including the aforementioned Choate, Elihu Root, Joseph E. McDonald of Indiana, a former U.S. and Attorney General who had been counsel the *Milligan* case, and the colorful Benjamin F. Butler, who at one time or another belonged to all major political parties and some minor ones.

In 1890, the Supreme Court reviewed two cases on the same day regarding age at the time of enlistment in the Army. One of them involved a 17-year-old who lied about his age by claiming he was 21 and thereafter deserted. The Supreme Court held that the contract of enlistment did not relieve him from any obligation to the Army.[78] In the other case, Taft again represented the United States against a man who said he was 28 when he joined the Army but was really 35. Again, the opinion focused on the enlistment contract. In this case, a court-martial decision was held to be final and the civil courts permitted review only to ensure proper jurisdiction. The Court held that the enlistment occurred as soon as the man took the oath, and that that was when his status changed from civilian to soldier.[79]

President Harrison signed the Evarts Act in 1891, which created a permanent set of intermediate federal appeals courts. Among the cases in which Solicitor General Taft was involved were early decisions under the Evarts Act with regard to the constitutional jurisdiction of the intermediate appellate courts, as well as the problems of venue in crimes that can occur in more than one district or state. Taft argued for the President's authority to suspend an Alaskan territorial judge appointed under Article I of the Constitution,[80] raised questions as to who could be tried on an Indian reservation for murder;[81] and tackled the political ramifications of Chinese immigration in the last part of the 19th century.[82]

Taft was appointed to the Sixth Circuit in 1892. Thus, in 1909, he became the only President of the United States to have served as a federal judge before taking office. After his unhappy presidency, Taft taught constitutional law at Yale. To avoid any conflict of interest for the federal judges he had appointed as

After Richard Nixon was defeated for governor in 1962, he was considered washed up as a politician, so he came to New York to practice law. Although Nixon narrowly lost the *Time, Inc.* case before the Supreme Court in 1966, his performance earned him the respect of the Justices, the press, and the legal community.

President, Taft refused to take on any representation in any federal court. He was obviously more sensitive on this subject than either of his predecessors, Harrison and Cleveland, neither of whom had qualms about arguing before judges they had appointed.

Judge Taft badly wanted the Supreme Court nomination that President William McKinley gave to Joseph McKenna in 1898.[83] McKenna stayed on the Court long enough to eventually serve with Chief Justice Taft when he was finally appointed to the Court by President Warren Harding in 1921. Taft had the distinction of being the first Chief Justice to graduate from law school.[84]

Richard M. Nixon on the Way Back

After his disastrous defeat running for governor of California in 1962, Richard M. Nixon switched coasts and became a partner in the New York firm Nixon, Mudge, Rose, Guthrie and Alexander. William Safire sets the stage for Nixon's trip east:

> When he came to New York in late 1963, after Warner-Hudnut chairman Elmer Bobst arranged for his name to be placed at the head of a prestigious but moribund law firm, Nixon was decidedly "through" as a potential political leader.[85]

While working as a lawyer, Nixon took on the case that would become *Time, Inc. v. Hill*[86] and argued it on April 27, 1966, before the Supreme Court. This was his only argument before *any* appellate court. Nixon took three weeks away from campaigning in the 1966 congressional elections and devoted himself to preparing for the oral argument. Harold R. Medina, Jr. of Cravath, Swaine & Moore argued for Time, Inc. Medina, the son of a legendary federal judge and himself a veteran Supreme Court advocate, was a formidable opposing counsel. The case was in many ways a follow-up to *New York Times v. Sullivan*,[87] in which the Court made it increasingly difficult

for political personalities, celebrities, and others similarly situated to bring defamation suits against the press by establishing actual malice.

The facts of the case are as follows. On September 11, 1952, three escaped convicts had taken over a home in a suburb of Philadelphia, holding James and Elizabeth Hill and their five children hostage for 19 hours. No harm was done or later claimed, but the story received sensationalized coverage in the national press. Elizabeth Hill found the publicity hard to bear. The Hill family moved to Connecticut and uniformly denied interviews, conscientiously fading from public view. All was well in this regard until, in February 1955, *Life* magazine published an article about a play entitled *The Desperate Hours* that portrayed a family held hostage by escaped convicts. *Life* described the play as a re-enactment of the Hill family experience and included photographs of their suburban Philadelphia home. But this impression was inconsistent with the realities of the Hill family experience, and indeed, the playwright, Joseph Hayes, denied that he had based it on the Hills' ordeal. In his play, the convicts acted brutally, beating up the father and sexually harassing the daughter. This distortion caused the Hills great distress, and they took legal action by hiring future President Nixon.

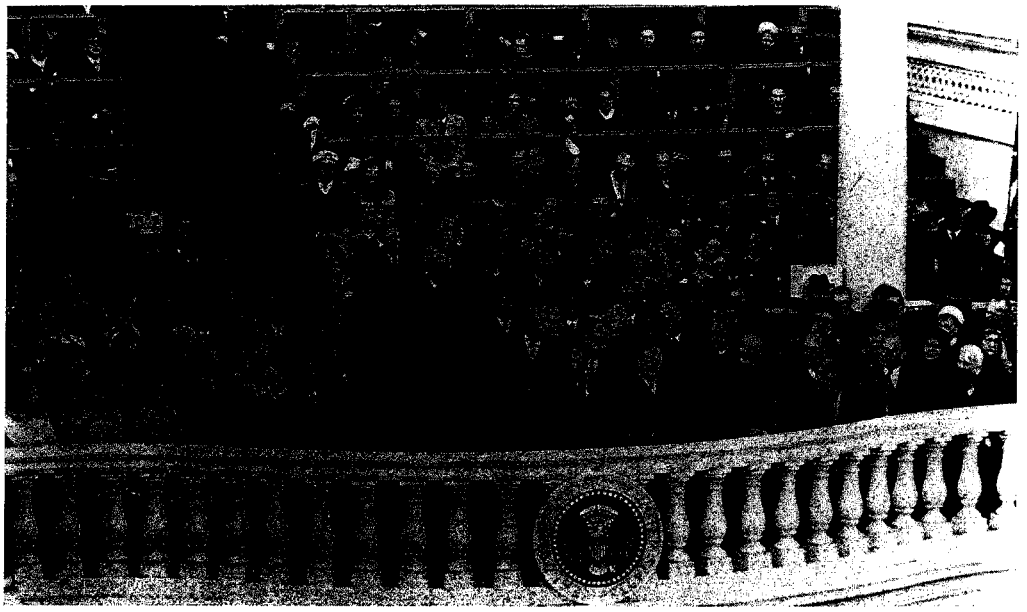
The fact that the Hills were not self-serving celebrities but the victims of notorious criminal activity made their case appealing to Nixon. Safire suggested a further motive for Nixon's taking on the Hills as clients: he could argue a legal position compatible with his private beliefs and, in the process, prove his competence as a real-life lawyer. The case had an issue ready-made for Nixon's predispositions regarding the excesses of the free press, especially when one recalls the late-night "final" news conference after his gubenatorial defeat in 1962. The intersection between the free press and privacy consumed Nixon.

After the oral argument, Nixon wrote a 2,500-word, self-critical memo about his performance. At the ceremony inducting Warren E. Burger as Chief Justice in 1969, he would also speak publicly about the experience:

> I have also had another experience at this Court. In 1966, as a member of the bar, I appeared on two occasions before the Supreme Court of the United States. Looking back on those two occasions, I can say, Mr. Chief Justice, that there is only one ordeal which is more challenging than a Presidential press conference, and that is to appear before the Supreme Court of the United States.[88]

But Nixon's professional performance won praise in surprising places. John MacKenzie wrote in *The Washington Post* that his presentation was "one of the better oral arguments of the year."[89] According to his biographers, Justice Abe Fortas offered high praise and expressed surprise that Nixon had done so well. He termed the Nixon argument "one of the best arguments he had heard since he had been on the Court" and opined that the future President could become "one of the great advocates of our times." Even Anthony Lewis was complimentary of the Nixon style, if not the substance of his argument.[90] In a brief piece tucked away on page 20, *The New York Times* characterized Nixon's professional demeanor before the Supreme Court as "comfortable," an adjective seldom used to describe him in any context and one that is at odds with his own description of the event. At lunch after the argument, the Brethren expressed surprise at how good Nixon was.

When the Court met in conference, there appeared to be a disposition in favor of the Hills, led by Justice Fortas and Chief Justice Earl Warren, supported generally by Justices John Marshall Harlan, Potter Stewart and Tom Clark. Had this majority held, the Hills would have won. But the reasoning required to get a result in favor of the Hills was directly at odds with the absolutist view of the First Amendment long held by Justices Hugo L. Black and



At Nixon's inauguration in 1969, Justices Black, Douglas, and Harlan were seated behind the President at right. Black (whose face is immediately to the right of Nixon) was the moving spirit behind the majority that had voted against the future President's arguments in the *Time, Inc.* case. Douglas joined the majority; Harlan concurred in part and dissented in part.

William O. Douglas. The writings of Bernard Schwartz[91] and Leonard Garment[92] indicate that Justice Black launched a rear-guard action, which eventually turned Justice Stewart and led to a re-argument and finally to the result sought by the two senior members of the Court.

The case was scheduled for re-argument on October 18. The day before the second argument, Black sent around an extended memorandum. Its tone, according to Schwartz, was "unusually sharp" and played a "key role" in changing the Court's decision. Schwartz adds, "[I]t is not clear why the Alabaman [Black] displayed such a distaste for his new colleague [Fortas]." The memo is further described as "an acerbic attack" and "sarcastic."

The second argument came just two weeks before the 1966 congressional elections, in which Nixon was stumping daily for congressional candidates. While Nixon had received generally favorable grades for his performance in the first argument, in his second argument he appeared distracted, won little applause, and, after it was over, did not enter into extended self-critical analysis. Garment, Nixon's co-counsel, said of the second argument, "Justice Black engaged Nixon in a fierce ten-minute colloquy in which neither yielded an inch of ground." But Nixon did not seem to have his mind on the case during the re-argument.

The decision divided the Warren Court in an interesting fashion. Nixon's arguments attracted the admiration and votes of Chief Justice Warren along with Justices Fortas and Clark. Justice Harlan concurred in part and dissented in part. The historical scholarship indicates that the moving spirit in collecting a majority was Justice Black, although Justice William J. Brennan wrote for the majority—no doubt by Black's assignment as senior Justice. Not surprisingly, Brennan was joined by Justice Douglas; somewhat surprisingly, he also picked up the silent vote of Justice Stewart. In a Watergate-tapes conversation with John Dean, Nixon later called the

vote 5 to $3\frac{1}{2}$—an obvious reference to the Harlan dissent.[93]

In 1989, Garment wrote a lengthy article about the case in *The New Yorker*, and Schwartz also dug into the back-channel processes that contributed to the decision. Schwartz included his findings in **The Unpublished Opinions of the Warren Court**, an offshoot of his biography of Earl Warren. *Hill* remained a very sore point with Nixon. Garment's conclusion is revealing:

> The irony of this struggle is that after all the speculation about how the Court would respond to Richard Nixon, the personal animus that determined the course of the Hill case was not antagonism toward Nixon by any member of the Court. The two Justices who had always detested Nixon's politics—Warren and Fortas—were unshakable defenders of his position in the Hill case. The central clash in Hill was actually between Hugo Black and Abe Fortas.[94]

In May 1969, Justice Fortas was severely damaged by a *Life* article disclosing his financial involvement with indicted stock manipulator Louis E. Wolfson. The press scandal eventually forced him to leave the Court. According to Garment, Fortas believed until his death in 1982 that the press scandal was a payback for his actions in *Hill*.[95]

Overall, the *Hill* episode had a positive outcome for Nixon. One biographer states:

> His homework, his logic, his presentation, and his commitment all impressed his law partners, the larger New York legal community, and the reporters covering the Supreme Court. Although he eventually lost the case 5–4, Nixon got from it the respect of his fellow lawyers. He proved what he already knew, that if he had devoted full time to his legal practice, he would have been one of the best.[96]

And Schwartz seems to argue that Supreme Court doctrine is edging back toward the position taken by Nixon in *Hill*.[97]

As for the client, the practical epilogue was that Elizabeth Hill finally received a substantial money settlement after the case was returned to the New York courts. The sad epilogue was her suicide in 1971.

Epilogue

Despite their many character differences and their being separated by nearly two centuries, John Quincy Adams and Richard M. Nixon had one characteristic in common: they were both self-critical worriers. In anticipation of his Supreme Court argument in *Amistad* in 1841, Adams wrote in his diaries about his anxieties over his ability to represent the African mutineers. Immediately after the Supreme Court handed down its decision, Adams worried about getting the Africans home. Similarly, the memo written by Nixon the night after his first argument reveals that he fretted about the quality of his arguments and his ability to help his client.

Adams and Nixon belong to the very narrow category of men who served both as Presidents of the United States and as advocates before the Supreme Court of the United States (see Table 1). This small group includes only six other lawyers who either would later occupy the presidency or had already served that office before arguing before the highest court in the land. Adams and Nixon could further boast that the cases they argued before the Supreme Court were of constitutional significance. James A. Garfield could also make that claim for his participation in *Milligan*. Other past or future Presidents argued cases that were either minor or important only in reference to the political issues of the time. But all the cases described above take on extra significance as occasions when men who were at one time chief executives of the nation served as advocates pleading for the Justices of the highest court to be swayed by their arguments.

TABLE 1 Admissions of Presidents to the Supreme Court Bar

John Quincy Adams	Admitted February 7, 1804, movant unknown.
James Knox Polk	Admitted January 10, 1827, movant unknown.
Abraham Lincoln	Admitted March 7, 1849, on motion by Mr. Lawrence.
James Abram Garfield	Admitted March 5, 1866, on motion by Mr. Jeremiah S. Black.
Benjamin Harrison	Admitted February 28, 1881, on motion by Attorney General Charles Devens.
Stephen Grover Cleveland	Admitted May 1, 1890, on motion by Augustus H. Garland.
William Howard Taft	Admitted March 3, 1890, on motion by Attorney General William Miller.
Richard M. Nixon	Admitted March 14, 1947, on motion by Fred N. Howser. Resigned June 23, 1975.

Grover Cleveland and Benjamin Harrison both argued cases before Justices whom they had appointed while serving as President. It is curious that the press apparently did not object to this practice, nor did the advocates themselves seem troubled by questions of possible conflict of interest. In any case, there is no evidence that the Justices felt compelled to vote in their appointers' favors. Perhaps reflecting a more ethical climate as much as a deep respect for the law, former President Taft refused to represent clients before any federal court, regardless of whether it held one of his own appointees.

ENDNOTES

[1]Paul C. Nagel, **John Quincy Adams** (Alfred A. Knopf, 1997), pp. 132–156. Richard Brookhiser, **America's First Dynasty: The Adamses 1735–1918** (The Free Press, 2002), p. 65–76.

[2]U.S. (2 Cranch) 187 (1804).

[3]U.S. (2 Cranch) (1804).

[4]Charles Francis Adams, ed. **The Memoirs of John Quincy Adams** (J. P. Lippincott & Co., 1874–1877), vol. 1, p. 295, February 17, 1804. *See also* Jean Edward Smith, **John Marshall: Definer of A Nation** (Henry Holt, 1996), p. 342.

[5]Nagel, **Adams**, p. 362.

[6]Allan Nevins, ed. **The Diary of John Quincy Adams** (Charles Scribner's Sons, 1951), p. 57.

[7]U.S. (5 Cranch) 57 (1809).

[8]In 9 Fed Cases 272 in *Fletcher v. Peck* (1807), there is notation "(nowhere reported); (opinion not now accessible)." The records of the Federal Circuit Court are in Massachusetts Circuit Court Records, RT, Federal Records Center, Boston. See also C. Peter Magrath, **Yazoo: Law and Politics in the New Republic** (Brown University Press, 1966), pp. 4–15.

[9]Nagel, **Adams**, p. 183.

[10]Charles Francis Adams, **Memoirs**, 1: 543–544, March 11, 1809. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). The opinions of both March 11, 1809 and March 16, 1810 are reported.

[11]Nevins, **Diary**, p. 58.

[12]Nagel, **Adams**, p. 199.

[13]For full details of Madison's efforts to fill the Cushing seat, see Henry Adams, **History of the United States during the First Administration of James Madison** (Charles Scribner's Sons, 1890), Books V and VI, p. 359–360. Madison also made the Story nomination over the strong opposition of Thomas Jefferson.

[14]Nevins records his last moments as the final item in **Diary** at p. 575:

> Adams served in the House till Feb. 21, 1848, when he was fatally stricken there. He was seated at his desk, when a neighboring member saw suddenly that he was in a state of convulsion and, removed to a committee room, he died on Feb. 23. This record may fittingly terminate with his victory in rescinding the gag rule.

[15]There has been heavy reliance on *Amistad*. See Federal Judicial Center, Amistad: *The Federal Courts and the Challenge to Slavery*, http://www.fjc.gov/history/amistad.nsf.

[16]Charles Francis Adams, **Memoirs**, 10: 358, October 27, 1840.

[17]Charles Francis Adams, **Memoirs**, 10: 2429, February 22, 1841.

[18]25 U.S. (12 Wheat) 546 (1827); 23 U.S. (10 Wheat.) 66 (1825); 24 U.S. (11 Wheat.) 743 (1826); John T. Noonan, Jr., **The Antelope** (University of California Press, 1977). Adams' concerns with the Antelope cases and his conferences with Francis Scott Key run throughout his entries of January and February 1841. Adams met with Key on the subject on January 14, 1841. See Charles Francis Adams, **Memoirs**, 10: 396–397.

[19]40 U.S. (15 Pet.) 547, 518 (1841). The statements of Adams in the Supreme Court can be found in Lynn Hudson Parsons, **John Quincy Adams** (Madison House, 1998), p. 239.

[20]President Adams had appointed Robert Trimble, who served only two years and died in 1828.

[21]7 U.S. (Curtis) 117 (1827). Ezekiel Norris appears to have litigated on the same land before the Supreme Court of Errors and Appeals of Tennessee in *Garner & Dickson v. Norris*, 9 Tenn. 62 (1821).

[22]Eugene McCormac, **James K. Polk** (University of Chicago Press, 1922), p. 12.

[23]David Herbert Donald, **Lincoln** (Simon & Schuster, 1995).

[24]Donald, **Lincoln**, pp. 185–193.

[25]48 U.S. (7 How.) 776 (1849).

[26]*Lewis v. Broadwell*, 15 Fed. Cas. 473 (Cir. D. Ill 1847).

[27]Allen I. Spiegel, **A. Lincoln, Esquire: A Shrewd, Sophisticated Lawyer in His Time** (Mercer University Press, 2002) p. 33.

[28]*Robert Forsyth v. John Reynolds et al*, 56 U.S. (15 How.) 358 (1854).

[29]For a somewhat romantic view of Alexander Campbell, see Louis Cochran, **The Fool of God** (College Press Publishing Co., 1985).

[30]71 U.S. (4 Wall.) 2 (1867).

[31]Joseph Harmon, **Garfield, The Lawyer** (Riverview Press, 1929), pp. 4–5.

[32]John Niven, **Salmon P. Chase, A Biography** (Oxford University Press, 1995), pp. 403–404. See also Albert Bushnell Hart, **Salmon Portland Chase** (Houghton Mifflin and Company, 1899), p. 345.

[33]Harry J. Sievers, **Benjamin Harrison: Hoosier Statesman** (University Publishers, 1959), vol. 2, ch. 3, pp. 30–45.

[34]Allan Peskin, **Garfield** (The Kent State University Press, 1978), p. 273.

[35]John M. Taylor, **Garfield of Ohio, The Available Man** (New York, 1970), p. 118. See also Niven, **Chase**, p. 404.

[36]76 U.S. 326 (9 Wall.) (1870).

[37]81 U.S. 44 (14 Wall.) (1872).

[38]*Baltimore and Potomac Railroad Company v. Trustees of Sixth Presbyterian Church*, 86 U.S. (19 Wall.) 62 (1874).

[39]*Baltimore and Potomac Railroad Company v. Trustees of Sixth Presbyterian Church*, 91 U.S. (1 Otto) 127 (1875).

[40]89 U.S. (22 Wall.) 60 (1875).

[41]86 U.S. (19 Wall.) 666 (1874).

[42]92 U.S. 161 (1876). In **Garfield,** Peskin refers to the receipt of legal fees of $5,000. In a memo to the author on 6/25/2002, he states that they were separate sums of $1,500 from one insurance case and $3,500 for the second case.

[43]*New York Life Ins. v. Statham*, 93 U.S. 24 (1876).

[44]*U.S. v. Allison*, 91 U.S. 303 (1876).

[45]*Newton v. Commissioners*, 100 U.S. 548 (1880).

[46]92 U.S. 358 (1876).

[47]See *Burke v. Smith*, 83 U.S. 390 (1872). For a brief overview, see Joseph Harmon, **Garfield, The Lawyer**, (Riverview Press, 1929).

[48]*Peake v. New Orleans*, 139 U.S. 342 (1891).

[49]Willard L. King, **Melville Weston Fuller**, (The Macmillan Company, 1950), p. 161–162. Allan Nevins, **Grover Cleveland: A Study In Courage** (Dodd, Mead & Co., 1934) does not mention Cleveland before the Supreme Court.

[50]Sievers, **Harrison**, 2: ch. 3, pp. 30–45.

[51]78 U.S. 96 (1870).

[52]103 U.S. 599 (1881).

[53]105 U.S. 322 (1882).

[54]108 U.S. 389 (1883).

[55]109 U.S. 168 (1883).

[56]110 U.S. 209 (1884).

[57]123 U.S. 436 (1887).

[58]123 U.S. 426 (1887).

[59]Reports of the Benjamin Harris Memorial Commission (U.S. Government Printing Office, 1941), Exhibit 2, **The Harrisons** by Ross Lockridge Jr., p. 102.

[60]King, **Fuller**, ch. 19, pp. 249–261.

[61]King, **Fuller**, p. 258.

[62]"General Harrison's Big Fees," *The New York Times*, December 12, 1896, p. 1.

[63]164 U.S. 112 (1896).

[64]164 U.S. 179 (1896).

[65]166 U.S. 506 (1897).

[66]166 U.S. 557 (1897).

[67]170 U.S. 283 (1898).

[68]170 U.S. 303 (1898).

[69]These California irrigation cases caught the attention of *The New York Times*, October 13, 1895.

[70]Leander J. Monks, **Courts and Lawyers of Indiana** (Federal Publishing Co., Inc. 1916), Vol. 2, p. 429.

[71]Chauncey M. Depew, **My Memories of Eighty Years** (Charles Scribner's Sons, 1922), p. 140.

[72]Henry F. Pringle, **The Life and Times of William Howard Taft** (Farrar & Rinehart, Inc., 1939), 1: 108–120.

[73]*In re Cooper*, 138 U.S. 404 (1891), 143 U.S. 472 (1892). Taft's arguments here are summarized in Pringle, **Taft**, 1: 117–18.

[74]*U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936).

[75]Samuel W. McCall, **The Life of Thomas Brackett Reed** (Houghton Mifflin Company, 1914), pp. 162–172; Richard B. Cheney and Lynne V. Cheney, **Kings of the Hill** (Simon & Schuster, 1996), pp. 96–116.

[76]*U.S. v. Ballin*, 144 U.S. 1 (1892).

[77]Pringle, **Taft**, 1: 115.

[78]*Morrissey v. Perry*, 137 U.S. 157 (1890).

[79]*U.S. v. Grimley*, 137 U.S. 147 (1890).

[80]*McAllister v. U.S.*, 140 U.S. 174 (1891).

[81]*Ex parte Wilson*, 141 U.S. 575 (1891).

[82]*Wan Shing v. U.S.*, 140 U.S. 424 (1891).

[83]Pringle, **Taft**, 1:153.

[84]Sometimes this distinction is given to Fuller, who attended Harvard Law School but did not graduate. See Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies**, 2d ed. (Congressional Quarterly Press, 1995), p. 247. Taft did graduate from Cincinnati Law School in 1880. Herbert S. Duffy, **William Howard Taft** (Minton, Balch & Co., 1930), p. 7.

[85]William Safire, **Before the Fall** (Doubleday & Co., 1975), p. 21.

[86]385 U.S. 374 (1967).

[87]376 U.S. 254 (1964).

[88]**Public Papers of Presidents of the United States 1969** (U.S. Government Printing Office, 1971), June 23, 1969, no. 249.

[89]Leonard Garment, "Annals of Law: The *Hill* Case," *The New Yorker*, April 17, 1989, pp. 97.

[90]Anthony Lewis, **Make No Law** (Random House, 1991), p. 188. "[T]he justices thought he did a superior job." The Fortas comment is found in Bruce Allen Murphy, **Fortas** (William Morrow and Company, 1988), p. 230. Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court, a Judicial Biography** (NYU Press, 1983), pp. 643–648. James Fitzpatrick, senior partner at Arnold & Porter in 2003, confirmed the conversations with Fortas in admiration of Nixon's performance in a 12/28/02 telephonic interview with the author.

[91]Bernard Schwartz, **The Unpublished Opinions of the Warren Court** (Oxford University Press, 1985), ch. 8, pp. 240–303.

[92]Leonard Garment, "Annals of Law: The *Hill* Case," *The New Yorker*, April 17, 1989, pp. 90–110.

[93]See Lewis, **Make No Law**, p. 188 for an account of the conversation with Dean.

[94]Garment, "Annals of Law," p. 106.

[95]Garment, "Annals of Law," p. 107.

[96]Stephen E. Ambrose, **Nixon** (Simon and Schuster 1989), vol. 2, p. 82.

[97]Schwartz, **Unpublished Opinions**, p. 302. A 9/23/02 letter to author from Anthony Lewis now puts him as a respector of the position taken by Nixon in *Hill*.